

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 2348

IN THE MATTER OF:

Served June 30, 1982

Application of JAMES M. SMITH,)
INC., for Special Authorization)
to Perform Charter Operations)
Pursuant to Contract -- National)
Institutes of Health)

Case No. CP-82-04

By application filed June 11, 1982, James M. Smith, Inc. (Smith), seeks authorization to operate pursuant to WMATC Special Certificate of Public Convenience and Necessity No. 1 under contract with the National Institutes of Health, DHHS (NIH) transporting NIH patients and outpatients, their parents and guardians, together with mail, express and baggage in the same vehicle with passengers, "within a 50-mile radius of Bethesda, Md." Applicant subsequently amended the territorial scope of its application to provide service between all points in the Metropolitan District, in conformance with the directive of Order No. 2346, served June 15, 1982.

Order No. 2346, which generally describes the evidence submitted with the application and is incorporated by reference herein, required publication of notice of the application and provided an opportunity for the filing of protests. Notice of the application was duly published and protests were filed by Beltway Limousine Service, Inc. (Beltway), on June 25, 1982, and International Limousine Service, Inc. (International), on June 28, 1982. 1/ Smith filed a motion to strike Beltway's protest on June 28, 1982, 2/ and by motion (letter) received June 29, 1982, applicant also seeks to strike International's protest.

1/ The filing by International was made just after the close of business on the due date for protests (June 28, 1982). It was received by a staff member of the Commission and will be accepted for filing. See Yohalem v. WMATC, 412 F.2d 1124 (D.C. Cir. 1969).

2/ This motion was filed after the close of business on June 28, 1982, and was received by a staff member. Inasmuch as a motion to strike would have been timely even if filed June 29, 1982, the pleading will be accepted. See Commission Regulation No. 15.

Beltway's protest essentially contends that the service proposed in the application fails to conform with the provisions of Regulation No. 70 and WMATC Special Certificate of Public Convenience and Necessity No. 1. Protestant argues that the passengers to be transported by Smith -- National Institutes of Health and Clinical Center patients/outpatients, their parents and/or guardians -- do not fall within any of the definitions of the applicable passenger categories encompassed in Regulation No. 70. Beltway states that the passengers are not employees, trainees or students as defined in the regulation, and that the application gives no indication that the passengers are members of a qualifying association. Furthermore, Beltway states that NIH is a government agency, not a qualifying association, and that the proposed passengers are not persons traveling on official business providing goods or services to NIH. Beltway asserts that, inasmuch as the proposed service does not meet the requirements of Regulation No. 70, the proceeding must meet the notice and hearing requirements of Title II, Article XII, Section 4(b) of the Compact regarding issuance of a certificate of public convenience and necessity.

International's protest alleges that Smith improperly assessed its wage expenditure in its bid for the contract award by failing to compute wage costs based on a United States Department of Labor Standard Wage Determination and that applicant has failed to register properly as a foreign corporation doing business in the Compact signatory jurisdictions. With regard to the registration matter, International states that absent appropriate standing to do business locally, Smith (a corporation domiciled in Georgia) has no legal authority to operate in the Metropolitan District. International contends that its bid on the proposed contract was predicated on a Standard Wage Determination 3/ that light-vehicle drivers in the territory generally including the Metropolitan District are to be paid a minimum hourly wage of \$5.29, and that Smith's bid was predicated upon a scale of \$4.25 for drivers' hourly wages. International contends that a significant share of the difference in bids between Smith and its own is a result of the different hourly wage rate used.

In its Motion to Strike Protest of Beltway Limousine Service, Inc., Smith asserts that the protest is dilatory, offered in bad faith and totally without merit. Smith argues that the protest is an indication of Beltway's continuing opposition to the concept and existence of the Regulation No. 70 licensing procedure and that acceptance of the protest for consideration on the merits would assist

3/ Wage Determination No. 75-1255(Rev.-6), dated July 28, 1981, of the United States Department of Labor Employment Standards Administration.

Beltway in its attempt to thwart the effectiveness of Regulation No. 70, and would allow Beltway to preserve for itself preferential treatment as the existing carrier providing NIH with the service under consideration herein.

By its motion (letter) seeking to strike International's protest, Smith argues that the protest is late-filed, has been submitted in bad faith, and addresses issues beyond the scope of proper protest in Regulation No. 70. It is asserted that the wage determination issue and the question of registration as a foreign corporation doing business in local jurisdictions are irrelevant to an application for authority pursuant to Regulation No. 70. Smith contends that the wage issue is a matter for NIH determination and the registration as a foreign corporation is a concern of the local signatory jurisdictions rather than the Commission.

With respect to the request to strike Beltway's protest, this motion will be denied. Beltway properly protested the application on one of the two grounds specifically provided for in Regulation No. 70-06, namely the conformance of the proposed operation to the provisions of the regulation. Smith offers no substantiation for its assertion that Beltway's protest is dilatory, in bad faith and without merit. Notwithstanding Smith's argument that Beltway is attempting to thwart the effectiveness of Regulation No. 70, it must be pointed out that Beltway now holds or in the past held authority to operate pursuant to four grants of authority issued under WMATC Special Certificate of Public Convenience and Necessity No. 1.

Smith's motion to reject the protest of International will also be denied. The issues raised by this protestant generally go to the matter of fitness to operate, one of the criteria to be considered on a case-by-case basis under Regulation No. 70.

Thus, the motions filed by Smith to strike the protests of Beltway and International, are hereby denied.

Commission Regulation No. 70 provides that an application of this type will be granted if it is determined that the applicant is fit, willing and able properly to perform the proposed service and to conform to the provisions of the Compact and the rules, regulations and orders of the Commission thereunder, and if it is determined that the proposed operations conform to the provisions of Regulation No. 70. The issue of whether the public convenience and necessity require such service has been determined in Case No. MP-79-04. See order No. 2004, served June 20, 1979.

Inasmuch as the contract is for a fixed term of at least 181 days and provides for the transportation of members of a qualifying association, the Commission finds that this application conforms to the requirements of Commission Regulation No. 70. It is further found, based on the evidence of record as described in Order No. 2346 that applicant is fit, willing and able properly to provide the service described above and to conform to the requirements of the Compact and the rules, regulations and orders of the Commission thereunder.

Beltway's assertion that the proposed service does not conform to Regulation No. 70 does not withstand scrutiny. The group to be transported is a defined class of passengers meeting the definition of a qualifying association. The passengers are individuals having a continuing common interest -- patients (with parents or guardians) requiring treatment at NIH -- and a common area for purposes of transportation under Regulation No. 70 -- NIH facilities. In fact, the Commission has granted special authorization for such qualifying associations as senior citizens attending a neighborhood day care facility 4/ and the impaired aged receiving therapeutic treatment in a geriatric day care center. 5/

Order No. 1959, served February 9, 1979, which instituted the proceeding in which Regulation No. 70 was adopted specifically included NIH outpatients as one of a list of groups being transported under charter-contract authority, where the normal process of certificating carriers under Title II, Article XII, Section 4(b) of the Compact, appeared to be ". . . basically incompatible with the inherent nature of most services now provided by charter-pursuant-to-contract carriers." 6/ In that same order, at pages 7-8, the Commission stated that

[t]he proposed regulation would also embrace . . . members of certain associations because such groups share significant characteristics with transported employees: the groups are relatively stable; they have a common purpose; they have a group relationship to the purchaser of their transportation similar to that of employees; and they are third-party beneficiaries of an agreement between two other parties.

4/ Order No. 2196, served February 17, 1981, Case No. CP-81-04.

5/ Order No. 2257, served September 30, 1981, Case No. CP-81-10.

6/ Order No. 1959 at page 4.

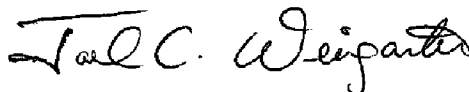
Inasmuch as the proposed service involves a qualifying association as intended within the scope of the regulation, the application is amenable to processing under Regulation No. 70.

International's claim that Smith did not calculate its bid in accordance with the cited wage determination is unsubstantiated on the record. There has been no showing that the underlying solicitation for bid requires hourly wages as asserted by International. A review of the solicitation included with the application fails to disclose a wage determination requirement. The basis for the difference in bids between International and Smith and the rationale for the selection of Smith as the acceptable low bidder on the involved solicitation is a matter for NIH determination. With respect to the matter of registration as a foreign corporation, Smith has complied with Commission requirements by naming a resident agent for service of process. In fact, Smith has previously provided service in the Metropolitan District pursuant to WMATC Special Certificate of Public Convenience and Necessity No. 1, under contracts which have since expired. Registration as a foreign corporation doing business in the signatory jurisdictions is a requirement of the state and District of Columbia governments, not this Commission.

Accordingly, the application will be granted commensurate with the terms of the agreement between Smith and NIH, contingent upon (1) the filing of two copies of an appropriate tariff consisting of a title page prepared in accordance with Commission Regulation No. 55-04 and an executed copy of the NIH-Smith contract, and (2) proof of the satisfactory inspection and approval of equipment for transportation for hire by one of the Compact signatory jurisdictions. Appropriate authorization to operate will be issued upon acceptance for filing of an appropriate tariff and proof of vehicle inspection. In addition, the certificate of insurance submitted by Smith indicates NIH rather than this Commission as the certificate holder for purposes of giving notice of insurance cancellation. The certificate of insurance must be amended to reflect this Commission as the certificate holder within 15 days. Finally, Smith is reassigned WMATC Carrier No. 35 and is directed to identify all motor vehicles utilized in service authorized by this Commission with the legend "WMATC No. 35" in accordance with Commission Regulation No. 70-10, and is further directed to file an affidavit of compliance with that regulation within 15 days from the date of service hereof.

IT IS SO ORDERED:

FOR THE COMMISSION:



JOEL C. WEINGARTEN
Acting Executive Director